

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)	CASE NO. 8:06CR61
)	
Plaintiff,)	
)	AMENDED
vs.)	TENTATIVE FINDINGS
)	
DALINDA GARCIA,)	
)	
Defendant.)	

The Court has received the Presentence Investigation Report ("PSR") and the Defendant's objections thereto (Filing No. 149). See Order on Sentencing Schedule, ¶ 6. The Court advises the parties that these Tentative Findings are issued with the understanding that, pursuant to *United States v. Booker*, 543 U.S. 220 (2005), the sentencing guidelines are advisory.

The Defendant objects to ¶¶ 38, 42, 45 and 78. The Defendant objects to the dangerous weapon enhancement being assessed without it being pled in the Information and having been proved to a jury beyond a reasonable doubt.

The Eighth Circuit has stated that enhancements are to be proved by a preponderance of the evidence as opposed to beyond a reasonable doubt. See, e.g., *United States v. McDonald*, 2006 WL 2589438, at *1 (Sept. 11, 2006) (citing *United States v. Pirani*, 406 F.3d 543, 551 n.4 (8th Cir. 2005)). The objection is denied to the extent that it addresses the Indictment and burden of proof issues. However, the issue will be heard at sentencing. The burden is on the government by a preponderance of the evidence. If the parties need more than 30 minutes for sentencing they shall immediately contact Edward Champion and reschedule the hearing.

IT IS ORDERED:

1. The Defendant's Objections to the Presentence Investigation Report (Filing No. 149) are denied as stated above;
2. The issue of the gun enhancement will be heard at sentencing, and the government bears the burden of proof by a preponderance of the evidence;
3. Otherwise the Court's tentative findings are that the Presentence Investigation Report is correct in all respects;
4. If **any** party wishes to challenge these tentative findings, the party shall immediately file in the court file and serve upon opposing counsel and the Court a motion challenging these tentative findings, supported by (a) such evidentiary materials as are required (giving due regard to the requirements of the local rules of practice respecting the submission of evidentiary materials), (b) a brief as to the law, and (c) if an evidentiary hearing is requested, a statement describing why an evidentiary hearing is necessary and an estimated length of time for the hearing;
5. Absent submission of the information required by paragraph 4 of this Order, my tentative findings may become final; and
6. Unless otherwise ordered, any motion challenging these tentative findings shall be resolved at sentencing.

DATED this 13th day of September, 2006.

BY THE COURT:

s/Laurie Smith Camp
United States District Judge